Preservation Banking: Its Value and Application

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Mitigation banking has been demonstrated to be an effective tool in helping to ensure that mitigation, when required, can be applied in a manner in which it effectively contributes to truly lasting long-term conservation. In reality, mandatory mitigation, traditionally applied, has often had little, or at most, unknown long-term value. Even policies such as "no net loss", when applied strictly through avoidance or on-site mitigation criteria, have often resulted in applications with little lasting conservation value and have in many instances, promoted the preservation or restoration of wetlands and other habitats which have, over the years, become isolated and, from an ecological perspective, largely insignificant because of expanding development in the surrounding landscape. Such applications of mitigation do not, in effect, contribute significantly to effective conservation, which should be the primary goal of all applied mitigation.

Mitigation banking is a tool that serves a broader-based conservation agenda by providing for large ecologically sustainable areas with guaranteed in-perpetuity protection and management. In this context, one of the challenges for banking has been to recognize and develop adequate flexibility in the process to allow it to most effectively achieve its full potential in helping to support broader landscape-based initiatives rather than just serving as a convenient place to apply existing mitigation policy. In fact, the formal federal wetland mitigation banking guidelines seem to infer, if not directly recognize, this broader value. In practice, however, the focus of mitigation banking and its actual application, especially where wetlands are concerned, has been to attempt to make it fit into the traditional way of considering wetland mitigation. This traditional mentality logically leads consideration of mitigation and mitigation banking toward a requirement that mitigation should maximize a restoration and/or creation component, and, in some cases, actually minimize a preservation component.

A Viable Role for Preservation Banks

The federal wetland mitigation banking guidelines contain the following guidance:

> *"Compensatory mitigation, under Section 10/404, is the restoration, creation, enhancement,* ***or in exceptional circumstances, preservation of wetlands and/or other aquatic resources*** *for the purpose of compensating for unavoidable adverse impacts. A site where wetlands and/or other aquatic resources are restored, created, enhanced,* ***or in exceptional circumstances, preserved*** *expressly for the purpose of providing compensatory mitigation in advance of authorized impacts to similar resources is a mitigation bank".*

In discussing the role of preservation, the guidelines further state that under certain circumstances:

> ***"...the preservation of existing wetlands and/or other aquatic resources in perpetuity may be authorized as the sole basis for generating credits in mitigation banks...consistent with existing regulations, policies and guidance.***
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> *Determining whether preservation is appropriate as the sole basis for generating credits at a mitigation bank requires careful judgment regarding a number of factors. Consideration must be given to whether wetlands and/or other aquatic resources proposed for preservation (1) perform physical or biological functions, the preservation of which is important to the region in which the aquatic resources are located, and (2) are under demonstrable threat of loss or substantial degradation due to human activities that might not otherwise be expected to be restricted. The existence of a demonstrable threat will be based on clear evidence of destructive land use changes which are consistent with local and regional land use trends and are not the consequence of actions under the control of the bank sponsor. Wetlands and other aquatic resources restored under the Conservation Reserve Program or similar programs requiring only temporary conservation easements may be eligible for banking credit upon termination of the original easement if the wetlands are provided permanent protection and it would otherwise be expected that the resources would be converted upon termination of the easement. The number of mitigation credits available from a bank that is based solely on preservation should be based on the functions that would otherwise be lost or degraded if the aquatic resources were not preserved, and the timing of such loss or degradation. As such, compensation for aquatic resource impacts will typically require a greater number of acres from a preservation bank than from a bank which is based on restoration, creation or enhancement."*

While purely preservation banks are acknowledged and provided for in the guidelines, in practice, the old traditions of sequencing and of allowing a preservation mitigation component only in the context of complimenting otherwise required restoration or creation efforts has continued as the predominant focus in considering and approving banks across the country. This said, in California for example, as the concept of banking has expanded well beyond its wetland roots into other aquatic and upland habitats, preservation banking has become an increasingly important tool in helping to achieve long-term conservation goals for listed and special status species and habitats. In southern California, preservation banks have become an extremely important factor in preserving remaining coastal sage-scrub habitat for the California gnatcatcher and other special status species, which are the focus of a regional Habitat Conservation Plan for the area. Throughout the Central Valley, vernal pool preservation banks have become critical tools in helping to preserve remaining vernal pool wetlands and their associated special status species. Other preservation banks have been, or are currently being established in support of conserving other special status resources including giant garter snake, San Joaquin kit fox, burrowing owl, red-legged frog, California tiger salamander, oak woodlands, etc.

The point here is that as the concept of mitigation banking has been more thoroughly thought through and worked through, new and broader applications have been discovered and are

beginning to be applied. The recognition that banking is one of only a very few truly economically viable conservation incentives for private landowners has elevated its value and importance in helping to implement the growing number of landscape-based conservation initiatives involving hundreds of thousands of acres that California is currently working on. Preservation banks, restoration/creation banks, and banks that combine both of these aspects will be important tools in the implementation of these regional planning programs.

Another important aspect in considering the utility of a purely preservation bank is identifying regional goals and objectives for applying mitigation. If the purpose of mitigation is seen primarily as meeting the requirements of law or regulation, and is not attached to any broader conservation purpose, then it will be difficult overcome the traditional ways in which such mitigation is perceived or applied. However, if mitigation is perceived in a manner that contributes to a larger landscape-based conservation agenda, then the question becomes one of how do we best use it toward this end? In this context, the real question becomes then, what is most needed on the landscape? For example, in a region where, from an overall ecological perspective, the total number of wetland acres is not considered to be a significant limiting factor in the face of projected future development, it may be more important to ensure that those acres that do remain after development have in perpetuity protection and management that will guarantee that they will me maintained in the highest quality possible. In this case there may be no real need or utility for restoration or creation of new wetlands (or in some cases, because of ecological, economic, or other factors, restoration or creation may not be feasible). Under this scenario, establishment of a preservation bank might be the most effective tool to guarantee that the land is secured in perpetuity (through fee title or permanent conservation easement), and that adequate funding (through establishment of an endowment through the sale of mitigation credits) is available to ensure that these lands will be managed in a manner that provides for their highest possible long-term conservation value.

Whose Decision Is It?

In spite of how mitigation has traditionally been applied, in reality, the true test of its success or failure should be its lasting contribution to long-term landscape-based conservation. This said, it is often difficult for regulatory and/or permitting agencies to look "outside the box" and be open to new and more innovative ways of using their authority in a manner in which it truly does contribute to a greater conservation purpose. The reality is that the limitations on how mitigation and mitigation banking is applied; what can or can't be done, lie mostly in the minds and practices of those in such agencies who decide on what mitigation is appropriate and where. Within reason, these same decision makers have the ability to exercise their opinions and their authorities in new and innovative ways should they choose. After all, guidelines and policies are just that, guidelines and policies. They do not in and of themselves, dictate what "must" be done, but provide parameters for consideration when making important decisions. With respect to mitigation banking, there is nothing that precludes individual agencies, or a Mitigation Bank Review Team from deciding that a certain action or approach (e.g., establishment of purely preservation bank, or allowing mitigation to be applied in a strictly preservation format) serves the greatest long-term conservation purpose within a particular region. The existing guidelines and processes contain flexibility that allows for such decision-making. It is both an opportunity, and I believe an obligation, for an MBRT to consider how mitigation, and mitigation banking,

can best serve lasting landscape-based conservation, and then to base its considerations and deliberations on how to make it work in this context, even if it means doing something differently than how it has been done before. If this can be accomplished, then conservation will be well served.

Crediting Considerations

Because it has not been extensively utilized, there is no specific or uniform formula for determining the appropriate ratio for applying all project-required mitigation in a purely preservation bank. This said, it is generally acknowledged that such mitigation, when deemed appropriate, should occur at a ratio that is somewhat higher than if it were being applied in a restoration/creation bank. A common sense approach would seem to dictate that the overarching conservation goals and objectives that were considered when establishing the preservation bank, or the landscape-based conservation purpose that the bank supports, should guide this determination. Another part of this consideration is the relatively rarity of the resources being impacted and that are being mitigated for. For example, a resource that is considered extremely rare would likely require a higher ratio (or purchase of a larger number of credits from a bank) than a resource that is more common. Using southern California as an example, mitigation for impacts to riparian habitat, of which only about five percent of what historically occurred remains, would warrant a significantly higher mitigation requirement than habitats that are somewhat less threatened or extirpated.

Typically, wetland mitigation applied in a fully restored and mature (i.e., all restoration/creation performance criteria have been met) mitigation bank may be as low as 2:1 or even 1:1 depending on the specific situation. At an approved vernal pool preservation bank in California's Central Valley, the U.S. Fish and Wildlife Service, in 2004, approved mitigation for impacts to vernal pool habitat and its related listed species at a ratio of approximately 3:1, which covered both preservation and restoration components of the mitigation requirement. It seems reasonable that when considering approval of project mitigation at a purely preservation bank, that applications in the range of 3:1 to 4:1 or 5:1 should be feasible, depending upon the specific impacts being mitigated for.